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The Status and Future of Governing institutions in Bosnia and Herzegovina and the Role of the International Community and United States.

Bosnia and Herzegovina has struggled to function as a viable democratic state from the day it achieved independence in 1992. Three years of war and ethnic cleansing destroyed whatever sense of shared national unity that existed at the time of independence.

The 1995 Dayton Peace Agreement, which ended the war, also redefined the three year old Bosnian state along ethnic lines. Dayton was never envisioned as a long term instrument, but as an interim minimalist solution until stability could be reestablished. This is plainly evident in the decision to publish the agreement, including the constitution of Bosnia and Herzegovina (Annex 4), in a foreign language, English; the deferral of a resolution of the status of Brcko district; and in the obvious underdevelopment of a number of the annexes. Regrettably, although Dayton did bring an end to open conflict, all sides in Bosnia were prepared to continue their struggle by political means. As a result, Dayton devolved rapidly from an interim solution to a virtually fossilized end-state instrument for governing the country. The international community, fearful that further negotiation of Dayton would reignite conflict, acquiesced in this vision and focused its energies on keeping the peace, directly confronting nationalist obstruction to implementing the agreement, and tinkering with reform around the edges of Dayton.

Over time this approach succeeded in clearing away obstructionist politicians and creating a framework for greater cooperation between the international community and locals. Indeed, as many of the original objectives of Dayton have been realized, the international community has increasingly shifted to a more consensual and functional model, relying on so-called soft impositions of needed legislation, giving locally elected authorities the opportunities to grapple with the issues first and weighing in only when it becomes clear that local politicians cannot reach a decision.

In recent years this approach has allowed the international community to begin to address one of the most serious flaws in the Dayton constitution: the almost sovereign position of the entities and the corresponding weakness of state institutions. Employing the power to cede authorities to the State under section 3.5c of the Dayton constitution, the international community and Bosnian authorities have put into place some of the attributes of a real state: a State Border Service, unified Intelligence Service, Security Ministry, Defense Ministry, state-level VAT and Customs authority, State Court, State Prosecutor, Criminal Code/Criminal Procedure Codes, Justice Ministry, and Civil Service Commission. These changes are consistent with the priorities of the Peace Implementation Council and the demands of European integration. However, none of these reforms have been formally incorporated into the Dayton constitution.

A critical component in the success of the international community's action was the acquiescence of the two ethnic minorities that had sought previously to break up the country. The Bosnian Croat nationalists' "Third Entity" movement has been repudiated by the very Croatian Democratic Union (HDZ) leaders who led the movement, and Bosnian Serbs have been an active partner in reforms, on the basis that they not threaten the continued existence of Republika Srpska. There is a palpable shift in the way people think about the future of Bosnia, with opinion polls since 2002 indicating that all minorities now believe that the state will survive, even if a strong Bosnian state may not be the first choice for ethnic minorities.

Another key factor has been the improvement in the regional environment. While still volatile, Bosnia and Herzegovina no longer inhabits a tough neighborhood where neighboring states with designs on territory support separatist parties in Bosnia and Herzegovina. Another positive sign was the lack of regional spillover when ethnic violence erupted in Kosovo in the spring of 2004. And the recent transfer of peacekeeping operations from NATO to EUFOR demonstrates that Bosnia and Herzegovina has already reached a tipping point where a slide back to conflict is improbable—though not impossible, as the volume of cached weapons recovered almost weekly by SFOR and now EUFOR evidence.

There are some who now assert in the international community that, as a consequence of these reforms, we are already in the post-Dayton phase in Bosnia and Herzegovina, but this assessment is premature. Bosnia is still very much defined by Dayton and will be for years to come. The simple fact is that despite all of the reforms made to date, Bosnia and Herzegovina is still largely governed by the flawed Dayton constitution. To date, the international community has been unwilling to tackle the issue of constitutional reform head on because to do so would expose openly the degree to which core divisions along ethnic lines—still powerfully exploited by the nationalist parties—continue to plague the country ten years after the end of the war.

That being said, there are many both in Bosnia and in the international community who believe that the time has come to address the problem of the Dayton constitution. Over the past two years, Bosnian politicians and civil society leaders have openly called for constitutional reform. Others quietly support it. And still others are prepared for reform as long as the word *constitutional* is not attached to it. I believe, frankly, a strong majority of Bosnians would welcome constitutional reform.

What is problematic with the Dayton constitution? The European Commission for Democracy Through Law or Venice Commission published a report on 11 March 2005 that assessed the “conformity of the Constitution of Bosnia and Herzegovina with the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Charter of Local Self-Government, as well as the efficiency and rationality of the present constitutional and legal arrangements in Bosnia and Herzegovina.” The Commission concluded that:

1. Despite the reforms made to date, Bosnia and Herzegovina remains constitutionally too weak a state to make sufficient progress toward European Integration;
2. A comprehensive and not a piecemeal transfer of competencies from the entities to the state must be carried out to strengthen it;
3. The current state legislative and executive structures “are not efficient and rational but cumbersome and with too many possibilities of blocking the taking of any decision”;
4. The current constitution enshrines too many prerogatives for ethnic or group rights and not enough for citizens;
5. Constitutional arrangements in the two entities are not parallel, and in the Federation in particular are neither efficient nor rational (the Commission did not, however, directly address the equally vexed issue of the entities’ future relationship to the state);
6. Neither the current state or entity constitutions “provide a sound basis for the future. It is desirable for the citizens at some state to decide to have an entirely new constitution based on their own wishes and drafted during a period without ethnic strife.”

Given the views of the Commission and the growing sentiment in Bosnia for constitutional reform, what impedes the translation of this sentiment into real action? There are four reasons.

First, there remain powerful nationalist and frankly criminal elements opposed to any change in the status quo that protects their interests. These include persons indicted for war crimes and their supporters.

Second, there are many in the Republika Srpska who fear that constitutional reform will mean the end of their entity.

Third, because of the ethnic divisions enshrined in the country's political structure, and the constraints on individual initiative in a country still dominated by communist era concepts of group think and identity, it is virtually impossible for any politician or political party to gain sufficient support or credibility across party and ethnic lines in support of constitutional reform.

Fourth, the continued international presence as a parallel authority perpetuates a dysfunctional political culture, as the local electorate look to the internationals to lead the reform process and to the incumbent parties to protect their ethnic interests. The current division of responsibilities allows all players in the local political game to have it their way. Ruling parties gain from this codependency since they enjoy the benefits of incumbency with no accountability or ownership of foreign-imposed policies and reforms. In turn, the High Representative and OHR dominate the political space that should be occupied by homegrown reformist parties and platforms cognizant of the importance of multiethnic collaboration, compromise, and coexistence as the optimal way to much needed Euro-Atlantic integrations.

How to resolve these impediments to constitutional reform and move Bosnia from Dayton and into Euro-Atlantic institutions? I offer four recommendations.

First, the international community must make constitutional reform a policy priority over the next two years. In October 2006, Bosnia and Herzegovina will hold national elections to select a government that will hold office for four years. If the country is to have any prospect of European integration in its near- to medium-term future, it must have a government that conforms to European Human Rights and Self-Government standards, and most importantly a government capable of negotiating a Stabilization and Association Agreement. Bosnia and Herzegovina does not have such a government at present and will not unless the constitution is legally amended at least 180 days before the election 2006 campaign begins. This means that a constitutional reform process needs to begin now and be completed by the early spring of 2006.

The second recommendation follows from this; specifically, it must be the mandate of the international mission in Bosnia to encourage and support actively constitutional reform. To that end, it is critical that member states of the PIC, *as well as the government of Bosnia and Herzegovina*, consider appropriately redefining the term and mandate of a new High Representative to succeed Lord Ashdown when his term expires in November 2005.

Indeed, the time has come for the PIC to review many of the assumptions behind the continued international presence in Bosnia and Herzegovina. While the strong military and civilian powers of the international community were absolutely essential in all of

the previous stages of our engagement in Bosnia and Herzegovina, they will become less useful for the next stage.

Third, there is also a need to match international structures to core objectives. This means ending the intrusive international community presence and shrinking its remaining large institutions, including OSCE and OHR. Although it may be too early to set an end-date for the international mission, one possibility would be January 2007, or 90 days after the October elections. The mission of the follow-on European peacekeeping force should also be reviewed as part of this process. Put succinctly, the following guidelines should be applied in assessing the future of the international role in Bosnia and Herzegovina: (1) the Bosnians need to make decisions themselves and (2) the role of the international community is to support and facilitate the process.

Finally, the United States, as the chief guarantor of Dayton, should take the lead in encouraging and supporting constitutional reform in Bosnia and Herzegovina. This could be done in a number of ways. First, the US could complement its current AID municipal reform package with a matching investment in support of reform at the level of state institutions. This would have the benefit of providing a direct stimulus to the Bosnian authorities to pursue a constitutional reform process. Second, Washington should work with the member states of the PIC and EU to recalibrate in part the mandate of the international mission to advise and assist Bosnia and Herzegovina in implementing constitutional reform in preparation for its assumption of full sovereignty by no later than early 2007 and the simultaneous launching of the process of SAP negotiations with the EU. To quote the Venice Commission: "While [Bosnia and Herzegovina] may still need more guidance from the international community, this could be provided by more subtle means." However, this recalibration should not include the shelving of the High Representative's Bonn Powers as there are still powerful forces of obstruction in Bosnia and Herzegovina capable of stalling indefinitely progress toward full democracy and European integration. The Bonn Powers should end on the day Bosnia and Herzegovina becomes a fully sovereign state.